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No. 539

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL., *Appellants*,

v.

MIDDLEWEST MOTOR FREIGHT BUREAU, ET AL., *Appellees*.

On Appeal From the United States District Court for the District of Minnesota, Fourth Division

MOTION TO DISMISS AND/OR AFFIRM

HAROLD C. EVARTS
1200 First National Bank Building
Minneapolis, Minnesota 55402

GEORGE D. MICHAELSON
P.O. Drawer 647
Kansas City, Missouri 64141

ROLAND RICE
1111 E Street, Northwest
Washington, D.C. 20004

Attorneys for Appellees

Of Counsel:

BEST, FLANAGAN, LEWIS, SIMONET & BELLOWS
1200 First National Bank Building
Minneapolis, Minnesota 55402

RICE, CARPENTER AND CARRAWAY
1111 E Street, Northwest
Washington, D.C. 20004

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MOTION TO DISMISS AND/OR AFFIRM

Appellees, the motor common carrier plaintiffs below (J.S. 2a) respectfully move, pursuant to Rule 16(1)(a) and (e) of the Revised Rules of this Court, that:

(1) The appeal be dismissed on the ground that this Court lacks jurisdiction, or, in the alternative, that

(2) The judgment of the court below be affirmed on the ground that it is manifest that the question upon which the cause depends does not warrant the plenary consideration of this Court.

STATEMENT OF THE CASE

Appellees respectfully submit that the following is an accurate statement of the question presented:

Will this Court entertain on direct appeal a final order and judgment dismissing without prejudice, on complainant's motion, a complaint wherein judicial review was sought of an order of the Interstate Commerce Commission, but where, through successful interposition of intervenors (appellants here) the injunctive restraint necessary to reach hearing on the merits was denied?

The order of the Interstate Commerce Commission under attack in these proceedings, entitled *LTL Class Rates and Minimum Charges Between Midwest and Central Territories*, I. & S. Docket M-17450, 325 I.C.C. 106 (1965), had its origin in tariff schedules published and filed with that Commission to become effective July 1, 1963. By these schedules appellee carriers initiated new and increased minimum charges and less-than-truckload class rates. Following protests filed by various traffic and/or trade associations and individual shippers, certain of the former being appellants here, the proposed schedules were suspended. Thereafter, by order of Division 2 of the Commission, the suspension was vacated, an investigation was ordered, and the new rates and charges were allowed to become effective on September 7, 1963.

Following hearing, and briefs filed in December, 1963, the Commission in its Report and Order dated February 24, 1965, found:

> "that the proposed increases are not shown to be just and reasonable." (325 I.C.C. at 122)

The Order further provided:

> "*It is ordered,* That the respondents herein be, and they are hereby, notified and required to cancel on or before April 14, 1965, the schedules described in the order entered on June 26, 1963, by the Commission's Board of Suspension upon not less than one day's notice to the Commission and to the general public by filing and posting in the manner prescribed by the Commission under Section 217 of the Interstate Commerce Act, and that this proceeding, be, and it is hereby, discontinued." (325 I.C.C. at 123)

Through subsequent administrative proceedings before the Commission, not pertinent here, the effective date of compliance with the provisions of the above order was postponed until September 13, 1965, at which time the administrative proceedings became final.

At that time, had the carriers elected to comply with the Commission order, cancel the rates, and forego judicial review, they were free to effectuate by publication new rates and charges at any level which their judgment indicated could be justified before the Commission. This level of rates would be initiated by the carriers upon their filing and posting new tariff schedules in the manner prescribed by the Commission under the authority of 49 U.S.C. 317(g).

Instead of canceling, and filing a different level of rates, the carriers sought judicial review of the Commission order and brought these proceedings in the court below under the statute, 28 U.S.C. 2321, *et seq.*, seeking to avoid the required cancellation on the grounds that (1) the order of cancellation was invalid because the Commission had retroactively applied new standards with which to appraise the evidence, and

(2) the Commission refused to grant a rehearing to permit further proof as to the validity of the rates at issue through the introduction of new evidence by the carriers meeting these new standards of proof articulated by the Commission in other proceedings after the close of hearing in this case.

A temporary restraining order was issued on September 9, 1965, ultimately conditioned upon the filing by appellees of an injunction bond, or bonds, providing, at appellants' request, for payment of "all sums paid in excess of rates or charges which would have been applicable on September 13, 1965, and thereafter, in compliance with the Interstate Commerce Commission's said order, . . ." provided the order of the Interstate Commerce Commission "shall be finally affirmed."

Appellees' motion for an interlocutory injunction was successfully opposed by appellants, and on September 29, 1965, the three-judge court entered its order dissolving the temporary restraining order and denying appellees' motion for an interlocutory injunction. (J.S., App. E)

This order, as already noted, forced the appellee carriers to seek from the Interstate Commerce Commission additional time in which to cancel the rates then at issue and to effectuate by publication on one day's notice a new schedule as a substitute for the old. The Commission by order of September 30, 1965, granted the carriers additional time, to October 11, 1965, within which to comply with its previous order. (See J.S., App. B, 6a, 7a.) On this latter date, the newly "authorized" schedule was published, filed and became effective. By these events the mootness later

found by the court to exist, had been brought about. (J.S., App. B, 8a)

The Commission order of September 30, 1965, is markedly different from that of February 24, 1965, as is immediately apparent from the excerpts of the ordering provisions in each when placed side by side:

Order of February 24, 1965	*Order of September 30, 1965*
The carriers are "required to *cancel* . . . the schedules described in the order entered on June 26, 1963 . . . ." (325 I.C.C. at 123)	The carriers are "authorized to *reestablish such rates as were in effect prior to* the issuance of the suspension order in this proceeding . . . ." (J.S., App. B, 7a)

(Emphasis added)

Dissolution of the temporary restraining order and denial of an interlocutory injunction prevented appellees from being heard on the merits of their cause prior to cancellation of the rates. With cancellation of the old rates, and publication of the new rates authorized in the September 30, 1965, order, the court below could not, and could not now, upon remand, afford any of the relief sought by appellees in their complaint.

Perceiving that matters affecting the counterclaims and injunction bonds were appropriate for disposition by a single judge, appellees, after the interlocutory injunction was denied, moved to dismiss the counterclaims and discharge the bonds. After hearing, an interim order was entered on February 2, 1967, (J.S. App. B), wherein a single judge, Nordbye, J., concluded that "the counterclaim of the intervener is a compulsory one which can be asserted in this action," (J.S. 21a) and that it "can and should be disposed of following the three-judge Court's determination of the merits involved in the Interstate Commerce Commis-

sion order." (J.S. 22a) That order also held that the appellees' motion to discharge or modify the bonds was "premature at this time," and denied the motion without prejudice to its being raised following a determination on the merits as to the lawfulness of the Commission order. (J.S. 23a)

Thereafter, motions were brought by the appellees which resulted in the order of September 5, 1968, (J.S. App. B), as modified by the order of April 9, 1969. (J.S. App. C) From the effect of these two orders, appellants now appeal.

Candor requires careful examination of those orders and an analysis of their effects, in order to place in proper perspective certain statements contained in the Jurisdictional Statement beginning at page 4. Contrary to the assertion of appellants (J.S. 4) the consequences of the district court's action are markedly different than if it had overruled and set aside the Commission's determination. Examination of those orders will follow to ascertain accurately the impact of that action.

In its first order, the three-judge court correctly observed that because appellees had obtained adequate rate relief from the Commission they were no longer interested in seeking the equitable relief initially sought by restraint of the February 24, 1965, Commission order. The court said:

> "Obviously, in light of the record, the issues between plaintiffs and the Interstate Commerce Commission and the United States have become moot, and a dismissal should be granted unless the intervention of the intervenors with their counterclaims requires a finding of this court as to the

merits of plaintiffs' action against the Commission as a condition precedent to the enforcement of said counterclaims." (J.S. 8a)

The court reasoned that if upon the admitted facts appellants had no enforceable claims against the carriers or their surety, no purpose would be served in passing upon the merits of the complaint ". . . in that these entire proceedings would then be moot and plaintiffs' motion should be granted."[1] (J.S. 8a)

In the view of the court, the Commission order of September 30, 1965, was made in the face of then apparent economic facts which had existed over a period of some two years since the challenged rates were first initiated. In the court's opinion, Commission authorization of the continued collection of the challenged rates of October 11, 1965, and its grant of higher rates effective November 16, 1965, exceeding even the revenue afforded by the challenged rates, indicated to the court that the temporary restraining order of the district court did not inflict any damages upon the intervenor-appellants. (J.S. 9a)

The court could, therefore, not make a determination that the carriers should have charged the pre-September 7, 1963, rates during the period of the temporary restraint when the Commission had thereafter, with its superior expertise, permitted the carriers to charge the challenged rates beyond the period of restraint. This indicated to the court that the grant of its temporary injunction inflicted no damage upon the shippers rate-wise. The court recognized that the Com-

[1] The correctness of this conclusion suggests mootness of this appeal and would support its dismissal by this Court. *United States* v. *Alaska S.S. Co.*, 253 U.S. 113 (1920).

mission, in its superior expertise, had exclusive jurisdiction to determine the legal rates during the period of restraint.[2]

The possibly "inappropriate"[3] use of the term "*nunc pro tunc*" as descriptive of the September 30, 1965, Commission order in the first of the three-judge court orders, impelled appellants to seek the rehearing which led to the final order of April 9, 1969. (J.S. App. C) In that order the court below, without reliance upon a "*nunc pro tunc*" effect of the Commission's order of September 30, 1965, reaffirmed its earlier order.

The statutory consequence of the entire scheme of rate regulation prescribed by Congress led the court to conclude that it would be inequitable to require restitution to the shippers for the period of the temporary restraint, when the Commission, by its order of September 30, 1965, intended to allow the continued collection of the published rates from September 30, 1965, to October 11, 1965, and allowed even higher rates thereafter, effective November 16, 1965.

As the three-judge court said:

> ". . . The carriers therefore continued to charge their published rates from September 13, 1965, to September 30, 1965, and it must be recognized

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[2] This Court in *T.I.M.E., Incorporated* v. *U.S.*, 359 U.S. 465 (1959), recognized that motor carriers could make no refund in published freight charges; subsequently Congress provided a legal remedy for the collection of unlawful charges through enactment of Public Law 89-179, effective September 6, 1965, covering the time period at issue (49 U.S.C. § 304a(2) (5), 79 Stat. 651), but appellants have not sought to perfect their claims under this statute.

[3] Acknowledged by the court below, J.S. App. C., 15a.

> that these rates never have been pronounced unlawful by the Commission. It is our view, therefore, that notwithstanding the Commission's interpretation of its order of September 30, 1965, it does not follow from the entire record herein that these challenged rates were unjust and unreasonable during the period from September 13 to September 30, 1965, so as to justify the relief which the intervenors request." (J.S. 15a-16a)

The court added:

> ". . . The restraining order, therefore, issued by this court, in light of the history of these proceedings, should be recognized as a continuance of the legally published rates and as effecting the same purposes and equities which the Commission achieved in its order of September 30, 1965. We conclude and find, therefore, that the rates charged by the carriers from September 13 to September 30, 1965, in light of the entire record and attendant circumstances, should not be considered as unjust and unreasonable by this court." (J.S. 16a)

The court thereupon affiirmed its prior dismissal of the complaint without prejudice, dismissal of appellant's counterclaims and discharge of the bonds. From such orders this appeal is taken.[4]

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[4] A similar appeal to this Court was taken by the United States Government, *qua* shipper, but was voluntarily dismissed by it. Concurrent appeals have been filed in the United States Court of Appeals for the Eighth Circuit by appellants here, and by the Government, *qua* shipper, from the orders below.

ARGUMENT

The Court Lacks Jurisdiction To Consider the Appeal

The fatal defect in appellants' position appears at page 11 of the Jurisdictional Statement, wherein, after characterizing the action of the three-judge court, appellants stated:

> ". . . If this is denial of an injunction which had been sought by the carrier-appellees, then appellants have no standing to invoke this court's jurisdiction. If this is the granting of an injunction, appellants have standing and this Court has jurisdiction."

Thereafter, appellants correctly stated that:

> "If the order below is neither the grant nor the denial of an injunction, the words of the Judicial Code appear to foreclose this Court's jurisdiction on appeal." (J.S. 11)

Appellees believe it eminently clear that the order below is "neither the grant nor the denial of an injunction" within the language and meaning of the Code (28 U.S.C. 1253).[5] Thus direct appeal is foreclosed.

The lack of jurisdiction here asserted by appellees is consistent with both their position respecting the effect of the decision below, and their interpretation of the decision of this Court in *Public Service Commission* v. *Brashear Freight Lines*, 306 U.S. 204 (1939).

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[5] Appellants evidently so concede, for in their application to this Court dated August 7, 1969, for extension of time within which to docket this appeal and to file their Jurisdictional Statement, they say, at page 2, "The judgment of the District Court on April 9, 1969, . . . neither granted injunctive relief nor denied it."

As to the first of the foregoing—appellees' position respecting the decision below—the crux of appellants' error in claiming that this Court has jurisdiction is found in their view (J.S. 13) that ". . . the counterclaim could not be dismissed below without a finding that the rates were just and reasonable . . ." This interpretation of the lower court's order is preceded by repeated contentions that the court *did* find that the rates *were* just and reasonable. (J.S. 8, 9, 13 and footnote, p. 13)

It is unmistakable that the court below made no such finding, but clearly stated:

> ". . . We conclude and find, therefore, that the rates charged by the carriers from September 13 to September 30, 1965, in light of the entire record and attendant circumstances, should not be considered as unjust and unreasonable by this court." (J.S. App. C 16a)

Accordingly, the court found that equity would not be served by an award of restitutional damages for it could find no damage. Obviously, the question there decided does not provide a basis for direct appeal under the Code.

Nor is this all. The court's recognition that ". . . these rates have never been pronounced unlawful by the Commission" (J.S. App. C 15a) is even more fundamental to the issue here and further demonstrates appellants' error. For while the appellants recognize the teachings of this Court in *Texas & Pacific Ry Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 462 (1907), as a bar to a judicial declaration that the carrier rates *were just and reasonable,* they fail to recognize that the converse holding, i.e., a finding that the rates were

unjust and unreasonable, rests similarly within the exclusive primary jurisdiction of the Commission. Without such a finding there can be no refund ordered by a court.[6]

As to their second position, appellees note that in the *Brashear* decision (306 U.S. 204), this Court dealt with an appeal from an order of a three-judge court dismissing a counterclaim. As to the right of appeal, the posture of appellant, successful below, was in all controlling respects similar to the posture of appellants here. This Court dismissed the appeal, noting that since appellant, the Public Service Commission, was a prevailing party below, it was not entitled to be heard on its direct appeal to this Court. Appellants here were the prevailing parties below, successfully resisting an interlocutory injunction, thus obtaining compliance with the Commission's cancellation order while also thwarting the carriers' efforts to have the Commission's decision set aside.

Brashear reached this Court a second time (312 U.S. 621 (1940)) after a *writ of certiorari* was granted to the court of appeals for the Eighth Circuit. The appeal there arose under a different statute than is involved here and the decision has no teaching for the instant situation.

The footnote at page 13 in the Jurisdictional Statement deserves special comment. Neither the Commission nor the district court found the rates to be "unjust and unreasonable." The Commission found

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[6] Since *Abilene*, it has been consistently held by this Court that a prior Commission order is essential. See, e.g., *Robinson* v. *Baltimore & O. R. Co.*, 222 U.S. 506, 32 S. Ct. 114 (1912) and *Darnell, Inc.* v. *Illinois Central R.R. Co.*, 225 U.S. 243, 32 S. Ct. 760 (1912).

them not to be shown just and reasonable. The court found the rates "should not be considered as unjust and unreasonable . . ." (J.S. 16a) What both the Commission in its September 30, 1965, order and the court below held was that the rates maintained during temporary restraint (but without either an affirmance or vacation of the Commission order) were the lawfully published rates and the only rates to be collected legally until the carriers complied with the Commission order directing their cancellation. Although the carriers failed in discharging fully their statutory burden of proof before the Commission to establish that the 1963 schedules were just and reasonable, neither did appellants establish their assertions that the rates were unlawful in any respect, nor could or did the Commission, on the record before it, make such a finding.

The brief stay granted by the court below to enable it to hear and dispose of the carriers' motion for an interlocutory injunction did not prevent appellants from achieving the benefit of the Commission's order, i.e., the cancellation of the rates at issue. Moreover, it forced the carriers to shoulder again the burden of proving the lawfulness of their new rates. The complaint has been dismissed, and the order of the Commission is not subject to an order of a district court of three judges granting or denying an injunction. The Court should deny jurisdiction of the appeal.

The Question Is Unsubstantial

Appellants, ascribing meaning neither intended nor necessary to support the lower court's orders here attacked, interpret the orders of September 5, 1968, and April 9, 1969, as though they constitute an in-

trusion upon the exclusive primary jurisdiction of the Interstate Commerce Commission. They incorrectly assert that the trial court found the level of rates maintained during the period of restraint to be "just and reasonable." (J.S. 8, 9) The court actually concluded and found that the rates charged during that period "should not be considered as unjust and unreasonable by this court." (J.S. App. C, 16a) But findings by a court as to the reasonableness or unreasonableness, the lawfulness or unlawfulness, or the justness or the unjustness of these rates maintained during the temporary restraint are not essential to a resolution of the issues joined by the complaint and answer, or to the propriety of the lower court's dismissal of the proceedings.

The matters under the guise of this appeal which appellants truly seek to reach relate solely to the existence or nonexistence of the right to restitution, which right is being suitably protected by appeals docketed and pending in the court of appeals.

The lower court said, in its September 5, 1968, order, that:

> "... The undeniable fact is that these intervenors during the injunction period did not pay any freight charges to these carriers which exceeded the rate set by the Commission. The granting of the temporary injunction inflicted no damage to them rate-wise. *It is for the Commission to determine the legal rates during this period,* and this it did by its *nunc pro tunc* order of September 30, 1965." (J.S. 10a, emphasis supplied)

It was the possibly "inappropriate" use of the term "*nunc pro tunc*" that induced appellants to seek reconsideration by the three-judge court of its order of

September 5, 1968. (J.S. 7) The trial court in its April 9, 1969, order, excised the words "*nunc pro tunc*" now relied upon by appellants, and in clear, unmistakable language confirmed the position consistently espoused by appellees throughout these proceedings that the rates maintained during the period of restraint were the effectively pubished rates, and hence the lawful rates, so long as a Commission order directing their cancellation had not become effective and until the carriers had initiated and effectuated new rates. The court adopted the Commission view on this subject expressed in its Joint Statement of Position and said that:

> ". . . Under the statutory scheme, specifically Section 216, 49 U.S.C. § 316, carriers initiate and publish rates which remain in force so long as a Commission order requiring their cancellation has not become effective." (J.S. 14a);

and later, that same April 9, 1969, order said:

> ". . . The carriers therefore continued to charge their published rates from September 13, 1965, to September 30, 1965, and it must be recognized that *these rates never have been pronounced unlawful by the Commission.* It is our view, therefore, that notwithstanding the Commission's interpretation of its order of September 30, 1965, it does not follow from the entire record herein, that these challenged rates were unjust and unreasonable during the period from September 13 to September 30, 1965, so as to justify the relief which the intervenors request." (J.S. 15a-16a, emphasis supplied);

and still later, the three-judge court said:

> ". . . *The restraining order*, therefore, issued by this Court, in light of the history of these proceed-

> ings, *should be recognized as a continuance of the legally published rates* and as effecting the same purposes and equities which the Commission achieved in its Order of September 30, 1965." (J.S. 16a., emphasis supplied)

Since these recited conclusions of the three-judge court are consonant with the statutory scheme of rate regulation, and further, since that level of rates is significant only as to the money claims of appellants, it follows that the lawfulness of the rates maintained during the restraint, and their effect upon the alleged right to restitutional recovery, are matters beyond the perimeters of this Court's jurisdiction. Their specific lawfulness or unlawfulness was not decided by the court below, and has never been decided by the Commission.

The remaining matter, and the only one possibly within this Court's limited jurisdiction, is that relating to dismissal of the complaint. The matter that would be on review before this Court relates only to whether appellees should proceed to a hearing which can have no prospective effect on tariff schedules which they were required to cancel. Such hearing would concern itself only with (1) the application of standards of evidence to a record made before the Commission in 1963, (2) the substantiality of the evidence to support the Commission order entered in 1965, (3) the adequacy of notice as to the application of new standards so as to comply with procedural requirements of due process, and (4) whether appellees should have been afforded a new or further hearing in the light of the alleged application of new standards.

The complaint, then, asked only that the district court decide whether the Commission had applied ac-

cepted procedural and substantive principles of law to an evidentiary record to determine whether the Commission acted within the limits of its discretion. Subsequent to Commission action here, the Commission has articulated its new standards and procedures for guidance in future proceedings before it.

Even were this Court to conclude that the carriers had been entitled to interlocutory relief to afford a hearing to determine their substantive rights before being required to cancel their rates, the rates at issue cannot be revived. Nor could the carriers benefit by a judicial determination that an order of the Commission with which they had been required to comply had been unlawfully issued.

The carriers have long since complied with the Commission order, have canceled the rates at issue and have made effective by new publication, with Commission approval, a new level of higher rates and charges. Focusing thus on the real issue raised by this appeal, it becomes increasingly clear that the question on which the decision of this cause must ultimately depend, i.e., whether the then known standards of evidence and reasonableness were properly applied by the Commission, is so unsubstantial as not to warrant exercise of the plenary jurisdiction of this Court for further briefing and oral argument.

The survival of an issue between the carriers and the shippers involving only the validity of claims for restitution is not so substantial a question as to require a judicial determination of the merits of the original complaint when all issues between the plaintiffs and defendants have become moot. *National Small Shipments Traffic Conference, Inc., et al.* v. *Ringsby Truck Lines, Inc., et al.*, 389 U.S. 576 (1968), 389 U.S. 909 (1967).

CONCLUSION

Appellees urge that the order of the court below be affirmed and that the appeal be denied for want of jurisdiction, or, alternatively, that it be dismissed for want of presenting a substantial question.

Respectfully submitted,

HAROLD C. EVARTS
1200 First National Bank Building
Minneapolis, Minnesota 55402

GEORGE D. MICHALSON
P.O. Drawer 647
Kansas City, Missouri 64141

ROLAND RICE
1111 E Street, Northwest
Washington, D.C. 20004

Attorneys for Appellees

Of Counsel:

BEST, FLANAGAN, LEWIS,
SIMONET & BELLOWS
1200 First National
Bank Building
Minneapolis, Minnesota
55402

RICE, CARPENTER AND
CARRAWAY
1111 E Street, Northwest
Washington, D.C. 20004